Supreme Court, U.S.
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In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

RANJIT SINGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, an alien who fails to appear for proceedings to deport him from the United States shall be ordered deported, *in absentia*, if the Immigration and Naturalization Service establishes that the alien received notice of the proceedings and is deportable. 8 U.S.C. 1252b(c)(1) (1994). The alien may seek rescission of the *in absentia* order if he files a timely motion to reopen and "demonstrates that the failure to appear was because of exceptional circumstances." 8 U.S.C. 1252b(c)(3)(A) (1994). "Exceptional circumstances" are statutorily defined to be "exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1252b(f)(2) (1994). The question presented in this case is:

Whether a mistake by an alien regarding the time of his hearing—notwithstanding his receipt of a notice correctly stating the date, time, and place of the hearing—may constitute "exceptional circumstances" beyond the control of the alien for his failure to appear.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 295 F.3d 1037. The opinion of the Board of Immigration Appeals (BIA) (App., *infra*, 6a-8a) and the decision of the immigration judge (IJ) (App., *infra*, 9a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2002. A petition for rehearing was denied on

October 31, 2002 (App., *infra*, 16a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

1. Section 1252b of Title 8 of the United States Code (1994) provided in pertinent part:

> **Deportation Procedures**
>
> **(c) Consequences of failure to appear**
>
> **(1) In general**
>
> Any alien who, after written notice required under subsection (a)(2) of this section has been provided to the alien or the alien's counsel of record, does not attend a proceeding under section 1252 of this title, shall be ordered deported under section 1252(b)(1) of this title in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable. The written notice by the Attorney General shall be considered sufficient for purposes of this paragraph if provided at the most recent address provided under subsection (a)(1)(F) of this section.
>
> * * * * *
>
> **(3) Rescission of order**
>
> Such an order may be rescinded only—
>
> (A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates

that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

The filing of the motion to reopen described in subparagraph (A) or (B) shall stay the deportation of the alien pending disposition of the motion.

(4) Effect on judicial review

Any petition for review under section 1105a of this title of an order entered in absentia under this subsection shall, notwithstanding such section, be filed not later than 60 days (or 30 days in the case of an alien convicted of an aggravated felony) after the date of the final order of deportation and shall (except in cases described in section 1105a(a)(5) of this title) be confined to the issues of the validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether or not clear, convincing, and unequivocal evidence of deportability has been established.

* * * * *

(f) Definitions

In this section:

* * * * *

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

2. Section 3.23(b)(4)(iii) of Title 8 of the Code of Federal Regulations provides in pertinent part:

Order entered in absentia in deportation or exclusion proceedings.

(A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

(1) Within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances); or

(2) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

* * * * *

(C) The filing of a motion to reopen under paragraph (b)(4)(iii)(A) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

STATEMENT

1. In the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 545(a), 104 Stat. 5061-5065, Congress took steps to reduce the frequency with which criminal aliens and other aliens failed to appear at their scheduled deportation hearings. See H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 150 (1990). Congress required the Attorney General to provide aliens in deportation proceedings written notice of, *inter alia*, the nature of the proceeding, the grounds for the charge of deportability, the alien's right to be represented by counsel, and the consequences of failing to appear at the proceeding. 8 U.S.C. 1252b(a)(1) and (2) (1994). Congress then directed that an alien who fails to appear at his deportation hearing "shall be ordered deported * * * in absentia if the [Immigration and Naturalization Service (INS)] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable." 8 U.S.C. 1252b(c)(1) (1994).[1]

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[1] The relevant provisions of the Immigration Act of 1990, originally codified as part of 8 U.S.C. 1252b, are now codified as amended as part of 8 U.S.C. 1229a. The original provisions apply in this case because petitioner was placed in deportation proceedings before major amendments to the immigration laws in 1996. Among other things, the 1996 amendments instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are inadmissible at the border. See 8 U.S.C. 1229,

If the alien received the statutorily required notice and was not prevented from appearing due to being held in federal or state custody, then the alien may seek rescission of the deportation order entered *in absentia* only if he moves "within 180 days after the date of the order of deportation" to reopen the deportation proceeding and "demonstrates that the failure to appear was because of exceptional circumstances (as defined in [8 U.S.C. 1252b(f)(2) (1994)])." 8 U.S.C. 1252b(c)(3)(A) (1994). Section 1252b(f)(2) in turn furnishes a definition of the term "exceptional circumstances," stating that the term "refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1252b(f)(2) (1994).

Congress also addressed judicial review of deportation orders entered *in absentia*, providing that review of such orders by a court of appeals "shall * * * be confined to the issues of the validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether or not clear, convincing, and unequivocal evidence of deportability has been established." 8 U.S.C. 1252b(c)(4) (1994).

Administrative regulations that govern the conduct of deportation proceedings incorporate the statutory

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1229a; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 309(a) and (c), 110 Stat. 3009-625. The post-enactment amendments to the *in absentia* removal provisions that are at issue in this case are minor and, as the court of appeals indicated (App., *infra*, 2a n.1), not relevant to respondent's case. See 8 U.S.C. 1229a(b)(5) and (e)(1); also compare 8 C.F.R. 3.23(b)(4)(ii) (reopening of removal orders entered *in absentia*) with 8 C.F.R. 3.23(b)(4)(iii) (reopening of deportation or exclusion orders entered *in absentia*).

requirements for obtaining reopening of an *in absentia* deportation order. See 8 C.F.R. 3.23(b)(4)(iii).

2. Respondent is a native and citizen of India who entered the United States unlawfully and without inspection in 1990. App., *infra*, 1a, 10a. In October 1994, the INS commenced deportation proceedings against respondent in San Francisco, based on his entry without inspection. *Id.* at 10a; see 8 U.S.C. 1251(a)(1)(B) (1994). Respondent's initial appearance in his deportation proceeding was set for July 1995. A.R. 131. In May 1995, respondent requested that his deportation proceeding be transferred to Philadelphia. A.R. 126. Respondent's request was granted and his appearance was rescheduled for October 1995. A.R. 118, 123. Respondent then requested a change of venue back to San Francisco. A.R. 105, 114. That request also was granted, A.R. 101, and the appearance was rescheduled in San Francisco for October 18, 1995, at 10:00 a.m. A.R. 98. At the October 1995 appearance, the case was continued (ultimately until July 18, 1996, at 2:30 p.m.) so that respondent could retain an attorney. A.R. 92, 97.

At his July 1996 appearance, respondent (who had not retained an attorney) conceded that he was deportable as charged, asserted a claim to asylum, see 8 U.S.C. 1158, and requested a further continuance so that he could pursue an application for lawful permanent resident status if, as he anticipated, his wife gained United States citizenship. See App., *infra*, 1a; A.R. 91. The requested continuance was granted, and respondent's next appearance was scheduled for October 10, 1996, at 2:00 p.m. A.R. 89. At the October 1996 appearance, respondent was represented by an attorney and obtained another continuance until April 3, 1997, at 1:00 p.m. A.R. 87-88. At the April 1997 appearance, respondent obtained another continuance, which

later was extended to October 9, 1997, at 1:00 p.m. A.R. 74, 85.

In June 1997, respondent applied for an adjustment of his status to lawful permanent resident. That application was based on his wife's newly acquired citizenship and an approved visa application that his wife had filed on his behalf. See App., *infra*, 2a; A.R. 39-43; see also 8 U.S.C. 1255(a). At respondent's October 1997 appearance, the immigration judge scheduled a hearing on respondent's application for adjustment of status for 11:00 a.m. on January 21, 1998. Respondent was given a written notice that identified the time and place of the hearing and he was warned of the statutory consequences of failing to appear. App., *infra*, 10a, 18a-23a.

Respondent failed to appear at the scheduled hearing on January 21, 1998, although his attorney did appear. Later that day, the IJ ordered respondent deported. App., *infra*, 10a, 14a-15a.

3. On March 31, 1998—more than two months after the entry of his *in absentia* deportation order—respondent, through counsel, filed a motion to rescind the deportation order and reopen the deportation proceedings. App., *infra*, 10a. In his motion, respondent asserted that he failed to appear at the January 21 hearing because he mistakenly believed that the hearing had been scheduled for 1:00 p.m. (not 11:00 a.m.). *Ibid.* The motion stated that respondent believed he was to meet his lawyer at 11:00 a.m., and that he arrived at his lawyer's office approximately at noon. *Id.* at 10a-11a.

The IJ denied respondent's motion. App., *infra*, 9a-13a. She explained that respondent, having received the required notice of his hearing (*id.* at 12a), had to "demonstrate[] that his failure to appear was because of exceptional circumstances" as defined in 8 U.S.C.

1252b(f)(2) (1994). App., *infra*, 11a. The IJ found no exceptional circumstances, noting that "it was fully within [respondent's] power to consult [the hearing] notice if he was confused as to what time he should appear in court." *Id.* at 12a. The IJ found "unpersuasive" respondent's excuse that he thought he had an appointment with his attorney at 11:00 a.m., noting that respondent did not arrive at his lawyer's office until noon. *Ibid.* The IJ also observed that respondent had failed to explain why he did not immediately contact the immigration court at noon on January 21 when he learned that he had missed his hearing, rather than "wait[ing] over two months before filing a motion to reopen with the court." *Ibid.*

4. The Board of Immigration Appeals affirmed in a per curiam order. App., *infra*, 6a-8a. The BIA observed that respondent did not dispute that he had received written notice of the hearing and the consequences of failing to appear. *Id.* at 7a. The BIA concluded that the "exceptional circumstances" standard of 8 U.S.C. 1252b(c)(3)(A) (1994) therefore applied and that "respondent's contention that he was not aware of the correct time for the hearing simply does not establish exceptional circumstances for his failure to appear." App., *infra*, 7a-8a.

5. The court of appeals reversed in a published opinion, holding that the BIA abused its discretion in concluding that respondent's failure to appear was not due to "exceptional circumstances" within the meaning of 8 U.S.C. 1252b(f)(2) (1994). App., *infra*, 1a-5a. The court found it critical that, because respondent is the spouse of a United States citizen and was the beneficiary of an approved immediate-relative visa petition, he was "eligible" under 8 U.S.C. 1255(a) to have his status adjusted to that of lawful permanent resident. App.,

infra, 2a. The court of appeals also believed that counsel for the government had conceded at oral argument before the court that "if the hearing [on January 21, 1998] had been held, [respondent] would not have been ordered deported." *Ibid.*[2]

On that basis, the court of appeals distinguished decisions of the Ninth Circuit and other circuits in which aliens unsuccessfully challenged administrative denials of their motions to reopen *in absentia* orders. App., *infra*, 3a-4a. The court characterized those cases as involving aliens who "were merely seeking to delay the inevitable" entry of a deportation order against them, *id.* at 3a, or "faced adverse actions" at their hearings, *id.* at 4a, and reasoned that "[t]his case is exceptional, because the petitioner had no possible reason to try to delay the hearing," *ibid.* Furthermore, according to the court, respondent "could have easily misunderstood the time of the January 21 hearing, since three of his previous hearings were scheduled for 1:00 p.m." *Ibid.* The court also expressed the view that respondent's appearance at his attorney's office at noon on the day of the hearing supported his assertion that he misunderstood the time of the hearing. *Ibid.* Finally, the court found it significant that the *in absentia* order of deportation would cause hardship to respondent's

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[2] Contrary to the court's apparent understanding, counsel for the government did not "concede[]" that respondent "would not have been ordered deported" if he had attended his January 21, 1998 hearing. App., *infra*, 2a. The tape recording of the argument before the Ninth Circuit reflects that, in response to the court's inquiry whether there was a "question" whether respondent "appeared to be eligible" to be considered for adjustment of his immigration status, counsel answered that respondent "had received a visa approval" but that "there were still formalities they had to go through."

family. *Ibid.* The court stated that "deporting an individual eligible for relief from deportation" would be "unreasonable," *id.* at 5a (citing *Chowdhury* v. *Ashcroft*, 241 F.3d 848, 853 (7th Cir. 2001) (cited as *Chowdhury* v. *INS*), and "absurd," *ibid.* Therefore, the court "conclude[d] that the BIA abused its discretion by entering an order that was arbitrary and irrational," and remanded the case to the BIA for consideration of respondent's application to adjust his status to that of lawful permanent resident of the United States. *Ibid.*

On October 31, 2002, the court of appeals denied the government's timely petition for rehearing and rehearing en banc. App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case is manifestly inconsistent with the plain language of the Immigration Act of 1990 and other circuits' applications of that Act. If not reversed by this Court, the decision threatens—contrary to congressional intent—to create new opportunities for delay of removal proceedings and to place substantial new burdens on immigration judges and the Board of Immigration Appeals. Because the court of appeals' error is so clear, we respectfully suggest that the Court may wish to consider summary reversal of the decision below.

1. The court of appeals directed reopening of respondent's deportation proceeding because it deemed the overall circumstances of his case exceptional in light of: (1) what it perceived to be respondent's strong incentive to appear at his hearing to pursue relief from deportation through his application for adjustment of status; (2) respondent's claim that he missed the hearing due to an inadvertent mistake; and (3) the family hardship that would result from failing to rescind

respondent's *in absentia* deportation order. App., *infra*, 4a-5a. None of those considerations, however, can support a finding of "exceptional circumstances" under 8 U.S.C. 1252b(c)(3)(A) (1994).

Section 1252b(c) states that if an alien in deportation proceedings, and not in federal or state custody (see 8 U.S.C. 1252b(c)(3)(B) (1994)), receives the statutorily required notice of his hearing and the consequences of failing to appear, but nevertheless fails to appear, then the entry of an *in absentia* order of deportation is mandatory (8 U.S.C. 1252b(c)(1) (1994)). The *in absentia* order is not subject to reopening on the alien's motion unless the alien shows that his "failure to appear was because of exceptional circumstances" (8 U.S.C. 1252b(c)(3)(A) (1994)) "beyond the control of the alien" (8 U.S.C. 1252b(f)(2) (1994)). Those provisions make clear that consideration of a motion to rescind an *in absentia* deportation order under Section 1252b(c)(3)(A) must focus on *the reasons for the alien's failure to appear*, not the alien's general situation or the consequences of the *in absentia* order. Indeed, Congress has specifically provided that when a court of appeals reviews an administrative "exceptional circumstances" determination, the court may consider—in addition to whether the alien received the statutorily required notice and whether the substantive grounds for deportation were sufficiently established—only "the reasons for the alien's not attending the proceeding." 8 U.S.C. 1252b(c)(4) (1994).

In this case, the record plainly did not compel the conclusion that respondent's "reasons for * * * not attending the proceeding" were extraordinary. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) ("To reverse the BIA finding we must find that the evidence not only *supports* [a conclusion different than the

BIA's], but *compels* it."). Respondent's own assertion is that he was mistaken about the time of his hearing, even though he had been given specific written notice of the date, time, and place. See App., *infra*, 7a, 18a-23a. It cannot reasonably be argued—and the Ninth Circuit did not suggest—that respondent's failure to double-check the time of his hearing was itself an exceptional circumstance akin to a serious illness or the death of an immediate relative, and beyond respondent's control. See 8 U.S.C. 1252b(f)(2) (1994).

2. The court of appeals' reliance on respondent's eligibility to be considered for the discretionary relief of adjustment of his immigration status, see App., *infra*, 2a, is entirely misplaced. Speculation about a non-appearing alien's *incentive* to appear for a hearing does not establish that the actual *reason* for his failure to appear satisfies the strict statutory standard. Here, respondent's failure to appear may have been "exceptional" in the sense of being unexpected, but it manifestly was not due to "exceptional circumstances * * * beyond [respondent's] control," as the Act requires in order for the IJ or BIA to grant a motion to rescind an *in absentia* order of deportation. 8 U.S.C. 1252b(f)(2) (1994).

Nor is there any merit to the court of appeals' suggestion that it would be "unconscionable" to deport respondent (or, certainly, to the notion that the court's perception to that effect allowed it to ignore clear statutory commands). App., *infra*, 5a. Respondent entered the United States unlawfully in 1990 and has remained in unlawful status throughout his time here. See *id.* at 1a. In fact, respondent conceded in his deportation proceeding that he is deportable as charged by the INS. A.R. 91. Although respondent nevertheless had an opportunity to pursue lawful permanent resident

status, he has never had any entitlement to lawful residency in the United States. The Attorney General, through the IJ and the BIA, would have made the status-adjustment decision "in his discretion." 8 U.S.C. 1255(a); see 8 C.F.R. 245.1, 245.2. Respondent therefore sought relief from deportation as "a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); cf. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (comparing Attorney General's "unfettered discretion" to grant waivers of deportation to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict") (citations omitted). Congress acted well within its plenary power over immigration when it determined that such discretionary relief should not be available to an alien who fails, for reasons within his own control, to appear as required for the deportation proceeding at which his application is to be considered. See *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952) (aliens "remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders").

The court of appeals assumed (App., *infra*, 2a) that the IJ or the BIA would have exercised the Attorney General's discretion in respondent's favor if respondent had taken all required steps and prosecuted his application at the January 21, 1998 hearing. But see note 2, *supra*. As discussed above, however, only respondent's "reasons for * * * not attending the proceeding" (8 U.S.C. 1252b(c)(4) (1994)) are relevant to judicial review of the BIA's denial of respondent's motion to rescind the *in absentia* deportation order entered against him. Furthermore, the court of appeals was required to review the BIA's decision in this case "solely upon the administrative record upon which the

deportation order is based," 8 U.S.C. 1105a(a)(4) (1994), and that record does not indicate whether respondent would have been granted lawful permanent resident status if he had appeared for his hearing.

3. The court of appeals' interpretation of Section 1252b(c)(3)'s "exceptional circumstances" requirement is inconsistent with the interpretations of every other circuit that has applied the statute to similar facts. No other court of appeals deems it relevant to the "exceptional circumstances" inquiry whether the alien would have been deported if he had appeared for his deportation proceeding. Rather, consistent with Congress's explicit direction, other circuits limit their inquiry to "the reasons for the alien's not attending the proceeding." 8 U.S.C. 1252b(c)(4) (1994); 8 U.S.C. 1229a(b)(5)(D). See *Ursachi* v. *INS*, 296 F.3d 592 (7th Cir. 2002) (upholding denial of motion to reopen *in absentia* deportation order despite alien's applications for political asylum and suspension of deportation, without considering merits of those claims); *Suleiman* v. *INS*, 238 F.3d 424 (6th Cir. 2000) (Table), 2000 WL 1720672 (unpublished decision) (rejecting claim that misunderstanding about hearing date was exceptional circumstance, without considering merits of deportation proceeding); *Soniregun* v. *INS*, 165 F.3d 19 (4th Cir. 1998) (Table), 1998 WL 736649 (unpublished decision) ("The merit of [the alien's] political asylum claim * * * is not a basis upon which the [BIA] is authorized to reopen deportation proceedings" after *in absentia* order.); *Rivera* v. *INS*, 122 F.3d 1062 (4th Cir. 1997) (Table), 1997 WL 539567 (unpublished decision) (rejecting alien's claim that postal error or attorney inadvertence constituted exceptional circumstances, without considering merits of deportation proceeding); *de Morales* v. *INS*, 116 F.3d 145, 148-149 (5th Cir. 1997)

(rejecting claim that car trouble was exceptional circumstance, without considering merits of deportation proceeding); *Siriphounsavat* v. *INS*, 77 F.3d 471 (4th Cir. 1996) (Table), 1996 WL 60442 (unpublished decision) (judicial review of refusal to reopen *in absentia* order "does not encompass the merits of the immigration judge's decision to order deportation"); *Dawodu* v. *INS*, 42 F.3d 1384 (1st Cir. 1994) (Table), 1994 WL 690416 (unpublished decision) (alien's "argument that he should not be deported because he had a valid, approved visa petition is not relevant to" consideration of motion to reopen under Section 1252b(c)(3)).[3]

4. The Ninth Circuit's error in this case will cause serious harm to the effective enforcement of the immigration laws. If the court of appeals' new definition of "exceptional circumstances" is satisfied whenever the alien may be "eligible for relief from deportation" (App., *infra*, 5a), then the decision below will require reopening of *in absentia* orders in a very large number of cases. The Justice Department's Executive Office for Immigration Review (EOIR) advises that in Fiscal Year 2002, its immigration judges entered 37,281 *in absentia* orders nationwide, of which 7898 were entered in the Ninth Circuit. More than half of the *in absentia* orders entered in the Ninth Circuit—56%—were entered in cases in which the alien had made a claim for relief from deportation, such as an application for

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[3] *Chowdhury* v. *Ashcroft*, 241 F.3d 848 (7th Cir. 2001), on which the court of appeals relied (App., *infra*, 5a), involved the application of administrative regulations governing numerical limitations on other types of motions to reopen, not the statutory provisions governing rescission of *in absentia* deportation orders. See 241 F.3d at 852-854. It provides no support for the Ninth Circuit's interpretation of 8 U.S.C. 1252b(c)(3) (1994) in this case.

asylum or adjustment of status.[4] Conceivably, therefore, the Ninth Circuit's decision might require reopening of thousands of *in absentia* orders in the Ninth Circuit each year. As a result, appearance at deportation proceedings effectively would become optional rather than mandatory whenever the alien has a facially valid claim of eligibility for relief from removal. Such a judicially crafted regime would defeat Congress's underlying objective of "ensur[ing] that aliens properly notified of impending deportation proceedings * * * in fact appear for such proceedings." H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990).

If, however, the court of appeals' decision is read more narrowly to apply only when the alien "would not have been ordered deported" (App., *infra*, 2a) if he had appeared for his hearing, then it will place a heavy new burden on the INS, IJs, and the BIA. Under that approach, the disposition of timely motions to rescind *in absentia* orders would require detailed consideration of the merits of the underlying deportation case and the alien's application(s) for relief from deportation. Based on the parties' submissions in the reopening proceeding, the IJ would have to predict the likely result of deportation proceedings that were not held because the alien failed to appear, in order to decide whether those proceedings should be reopened. It might even be

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[4] Nationwide, 23% of the *in absentia* orders were entered in cases in which the alien had made a claim for relief from deportation. The much higher incidence of claims for relief in the Ninth Circuit may be a consequence of the Ninth Circuit's own decisions in this area, which often require relief from deportation when relief would not be available in any other circuit. See, *e.g.*, *Abovian* v. *INS*, 257 F.3d 971 (9th Cir. 2001) (Kozinski, J., dissenting from denial of rehearing en banc) (discussing Ninth Circuit asylum decisions).

necessary to convene a hearing to take evidence on the underlying issues in the deportation proceeding, in order to rule on the motion to reopen.

EOIR advises that in the Ninth Circuit alone, aliens who failed to appear and had a final order entered against them in Fiscal Year 2002 have filed a total of 1278 motions to reopen those final orders. Nationwide, there have been 3988 such motions to reopen. Given the frequency with which motions to reopen were filed even prior to the Ninth Circuit's decision in this case—and the further incentive that many aliens will have to file such motions under the Ninth Circuit's decision—a requirement that IJs hold "mini merits proceedings" to consider motions to rescind *in absentia* deportation orders would impose a significant new burden on IJs and the INS that Congress clearly did not intend.[5]

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[5] In *INS* v. *Ventura*, 123 S. Ct. 353 (2002), the Court stated that reviewing courts must allow the BIA "the opportunity to address [a] matter [within its assigned area of responsibility] in the first instance in light of its own expertise." *Id.* at 356. In this case, as in *Ventura*, the Ninth Circuit—after overturning the BIA's specific grounds for upholding the IJ's decision—proceeded to resolve issues that the IJ and BIA have not had an opportunity to address. See *id.* at 354-355. Specifically, the court of appeals ordered reopening of respondent's deportation proceeding (App., *infra*, 5a) despite the absence of any administrative determination whether, under the court of appeals' new test, reopening is warranted. Issues that might be considered on remand—and that reasonably were not considered by the IJ because respondent's excuse for failing to appear was facially insufficient under prior precedent, see *id.* at 7a-8a—include whether the factual allegations underlying respondent's motion to reopen are true. See *Ventura*, 123 S. Ct. at 356 (noting that "remand could lead to the presentation of new evidence").

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the court of appeals.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
DONALD E. KEENER
ALISON R. DRUCKER

JANUARY 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-71043

RANJIT SINGH, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICES,
RESPONDENT

[Filed: July 12, 2002]

OPINION

SCHROEDER, Chief Judge

This is a highly unusual case. The appellant, Ranjit Singh, a native and citizen of India, unlawfully entered the United States in July 1990. He has diligently pursued his efforts to obtain lawful permanent residence status on the basis of his marriage. He appeared for five deportation hearings between October 1995 and October 1997, which were all continued. Several other hearings were contained upon his request until his wife could obtain citizenship. Finally, after his wife had become a naturalized United States citizen, and he became facially eligible for the status adjustment, he drove several hours with his wife and newborn baby to attend a deportation hearing on January 21, 1998 at 1:00 p.m., only to discover that the hearing had been scheduled for 11:00 a.m. and that he had been ordered deported *in absentia.*

On the record before us, it appears Singh is eligible for adjustment of status as the spouse of an U.S. Citizen and the beneficiary of an immediate relative immigrant petition approved by the INS. 8 U.S.C. § 1255(a) (2002). Indeed, the INS commendably conceded at oral argument that apart from a few formalities that needed to be carried out, if the hearing had been held, Singh would not have been ordered deported.

The IJ, however, denied Singh's motion to reopen and rescind the deportation order. The BIA denied his appeal with a conclusory statement that there were not exceptional circumstances as required by 8 U.S.C. § 1252b(c)(3)(A) (1994).[1] He appeals the BIA's decision claiming that his is the exceptional case, and we agree.

We review the BIA's decision for abuse of discretion. *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996). We will reverse the BIA's denial of a motion to reopen if it is "arbitrary, irrational, or contrary to law." *Ahwazi* v. *INS*, 751 F.2d 1120, 1122 (9th Cir. 1985). A petitioner is entitled to recission of a deportation order issued *in absentia* by filing a motion to reopen within 180 days of the date of the order of removal and by demonstrating that "exceptional circumstances" were the cause of the failure to appear. 8 U.S.C. § 1252b(c)(3)(A) (1994). "Exceptional circumstances" is defined by statute as "exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1252b(f)(2) (1994).

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[1] Section 1252b was deleted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a), 110 Stat. 3009 (1996), and recodified in essentially the same form at 8 U.S.C. § 1229a(b)(5) (2002).

The INS contends that failing to attend a hearing on a claim of mistake is not an exceptional circumstance because it happens frequently. Both of the cases on which it relies, and where we held exceptional circumstances did not exist, were cases in which the petitioners were not, as Singh is, the beneficiary of an approved visa petition. Those petitioners were merely seeking to delay the inevitable. *See Singh-Bhathal v. INS*, 170 F.3d 943, 944 (9th Cir. 1999); *Sharma*, 89 F.3d at 546.

In *Singh-Bhathal*, the petitioner was taken into INS custody after entering the United States illegally. 170 F.3d at 944. He was released on bail and was sent a notice that he was to appear at a deportation hearing. He did not appear and was ordered deported *in absentia*. *Id.* He then filed an application for asylum under an alias at an INS office in another city. *Id.* We affirmed the BIA's dismissal of his appeal because he had not filed a timely motion to reopen and because we found that he had made a voluntary choice not to appear. Singh Bhathal had every reason not to appear for his hearing, since he lacked a plausible claim to avoid deportation.

We affirmed the BIA's dismissal of the petitioners' appeal in *Sharma*, when the petitioners were 45 minutes to one hour late for their deportation hearing due to traffic congestion and parking difficulties, because we agreed that the petitioners had not established exceptional circumstances. 89 F.3d at 546. The petitioners' only possibility of relief from deportation in that case was a discretionary grant of asylum. The IJ had previously warned the hearing would proceed *in absentia* if they did not appear, and this court stressed the importance of the government's interest "in pre-

serving incentives to discourage delays in requests for relief." *Id.* at 547-48.

Cases from other circuits relied upon by the INS also involved petitioners who failed to appear for a hearing where they faced adverse actions. In *de Morales v. INS*, 116 F.3d 145 (5th Cir. 1997), the petitioners had no asylum or other claims for relief pending when they failed to appear at their first deportation hearing. *Id.* at 146. In *Thomas v. INS*, 976 F.2d 786 (1st Cir. 1992) (per curiam), the petitioner was subject to deportation based on conviction of a serious crime. *Id.* at 787.

This court must look to the "particularized facts presented in each case" in determining whether the petitioner has established exceptional circumstances. *Singh* v. *INS*, 213 F.3d 1050, 1052 (9th Cir. 2000). This case is exceptional, because the petitioner had no possible reason to try to delay the hearing. Indeed, the hearing was the culmination of years of efforts to obtain lawful permanent residence status. Singh diligently appeared for all of his previous hearings and had even requested a change of venue when he believed he and his wife were to move to another state. The record reflects that Singh could have easily misunderstood the time of the January 21 hearing, since three of his previous hearings were scheduled for 1:00 p.m. Singh's appearance at his attorney's office at 12 p.m., a full hour before Singh believed he needed to appear at the courthouse, supports his assertion that he misunderstood the time of his hearing. The order of deportation issued *in absentia* in this case would result in either the break-up of a family or if the family were to remain intact, the ouster of three American citizens—Singh's wife and two children.

We agree with the Seventh Circuit that the INS should not deny reopening of an *in absentia* deportation order where the denial leads to the unconscionable result of deporting an individual eligible for relief from deportation. *See Chowdhury v. INS*, 241 F.3d 848 (7th Cir. 2001). There the petitioner was ordered deported *in absentia* and his immediate relative visa petition was then approved while his appeal of the deportation order was pending. *Id.* at 849. The BIA denied reopening and thus, the petitioner stood to be deported without ever having the INS consider the merits of his application for adjustment of status which, like Singh's application in this case, stated he had married an American citizen. *Id.* at 853. The INS argued that because the petitioner had the option of returning to his native country of Bangladesh, presenting his approved visa petition to the consulate there and applying for a visa, the deportation order was not "unconscionable." *Id.* The court rejected the argument and held that the BIA regulations "should not be so strictly interpreted as to provide unreasonable, unfair, and absurd results." *Id.* We would approve just such an absurd result if we were to approve the BIA's order denying reopening and thereby requiring the deportation of an individual with a valid claim for relief from deportation. We conclude that the BIA abused its discretion by entering an order that was arbitrary and irrational.

We therefore GRANT the petition for review, and REMAND the case to the BIA for consideration of the merits of Singh's application for adjustment of status.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A72 669 621—San Francisco

IN THE MATTER OF RANJIT SINGH

Date: [May 30, 2001]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Alan M. Kaufman, Esquire

ON BEHALF OF SERVICE:

James S. Stolley, Jr.
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act
[8 U.S.C. § 1251(a)(1)(B)] -
Entered without inspection

APPLICATION:

Reopening

ORDER

PER CURIAM. The respondent's appeal from the Immigration Judge's April 21, 1998, decision denying his motion to reopen proceedings and rescind the deportation order entered *in absentia* is dismissed.

An order of deportation issued following proceedings conducted *in absentia* pursuant to section 242B(c) of the Immigration Nationality Act, 8 U.S.C. § 1252b(c), may be rescinded only upon a motion to reopen demonstrating that the alien failed to appear because of exceptional circumstances, because he did not receive proper notice of the hearing, or because he was in federal or state custody and failed to appear through no fault of his own. *See* section 242B(c)(3) of the Act, 8 U.S.C. § 1252b(c)(3); *see also Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995); *Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993). The term "exceptional circumstances" refers to exceptional circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. *See* section 242B(f)(2) of the Act; *Singh-Bhathal v. INS*, 170 F.3d 943, 946 (9th Cir. 1999).

On appeal, the respondent asserts that he misunderstood the time of his scheduled hearing, and that the Immigration Judge erred by finding that this did not constitute exceptional circumstances excusing the respondent's failure to appear. The record reflects, and the respondent does not contest, that he received written notice of his hearing date, and of the consequences for failing to be present on the appointed date and time (Exh. 3). The respondent's contention that he was not aware of the correct time for the hearing

simply does not establish exceptional circumstances for his failure to appear. *See* section 242B(f)(2) of the Act; *Signh-Bhathal v. INS*, *supra*, at 946.

Accordingly, the appeal is dismissed.

/s/ JOHN GUENDELSBERGER
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

File Number A72-669-621

IN RE RANJIT SINGH, RESPONDENT

Date: [Apr. 21, 1998]

IN DEPORTATION PROCEEDINGS

CHARGE:

INA § 241(a)(1)(B) – Entry Without Inspection

APPLICATION:

Motion to Reopen

ON BEHALF OF RESPONDENT:

Jonathan M. Kaufman, Esq.
220 Montgomery Street, Suite 976
San Francisco, CA 94104

ON BEHALF OF THE SERVICE:

James S. Stolley, Jr., Esq.
Assistant District Counsel
P.O. Box 26449
San Francisco, CA 94126-6449

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent, Ranjit Singh, is a native and citizen of India.

On October 7, 1994, the Immigration and Naturalization Service ("Service") initiated deportation proceedings against the respondent with the filing of an Order to Show Cause with the Immigration Court. Exhibit 1. The Service alleged, *inter alia*, that the respondent entered the United States without inspection. *Id.* Accordingly, the Service charged that the respondent is deportable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act ("Act"). *Id.*

On October 16, 1998, the respondent appeared before this court with his attorney. At that time the proceedings were continued until January 21, 1998, at 11:00 a.m. The respondent was given written notice of the new hearing date and time. Exhibit 3. The respondent failed to appear on January 21, 1998; therefore, this court ordered him deported in absentia.

On March 31, 1998, the respondent, though counsel, moved to rescind the deportation order entered against him and reopen his deportation proceedings. The Service opposes.

II. Facts

The respondent submits his own declaration and that of his attorney in support of the motion to reopen. He asserts that he failed to appear at his hearing because he misunderstood the time of the hearing. He claims that he believed that his hearing was scheduled for 1:00 p.m., as his previous hearing was held at that time.

Further, the respondent asserts that he believed that he had an appointment with his attorney at 11:00 a.m. on January 21, 1998. However, he does not explain why he arrived at his attorney's office an hour late at noon. Attorney Kaufman's declaration confirms that the respondent arrived at his office at approximately noon on January 21, 1998.

III. Discussion

Under section 242B(c)(3) of the Act in absentia orders of deportation may only be rescinded under the following three circumstances: first, upon a motion to reopen filed within 180 days after the date of the order of deportation, if the alien demonstrates that his failure to appear was because of exceptional circumstances. *See Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996); *In re W-F-*, Int. Dec. 3288 (BIA 1996); 8 C.F.R. § 3.23(b)(4)(iii)(1) (1997); second, upon a motion to reopen filed at any time if the alien demonstrates that he did not receive proper notice in accordance with the statute; and third, if the alien demonstrates that he was in Federal or State custody and did not appear through no fault of the alien. INA §242B(c)(3); 8 C.F.R. § 3.23(b)(4)(iii)(2) (1997).

"Exceptional circumstances" are defined in section 242(f)(2) of the Act as circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances beyond the movant's control. Further, the language of the Act does not limit the definition to serious illness or death, as long as the circumstances are "compelling" and "beyond the control" of the movant.

Here, the respondent asserts that he failed to appear at his hearing because he believed that his hearing was scheduled at 1:00 p.m. and not 11:00 a.m. The respondent was given personal notice that his hearing was scheduled for 11:00 a.m. on January 21, 1998. Exhibit 3. The court therefore finds that he was given proper notice of his hearing.

Moreover, this court finds that the respondent has not shown that exceptional circumstances existed which excuse his failure to appear. The respondent was given written notice of his hearing date and it was fully within his power to consult that notice if he was confused as to what time he should appear in court. His excuse that he believed he had an appointment with his attorney at 11:00 a.m. is unpersuasive. The respondent provides no reason for why he arrived an hour late for his appointment with his attorney. Accordingly, the court can only assume that he would have arrived late for his hearing as well had he realized it was at 11:00 a.m.

Finally, the respondent does not explain why he did not immediately contact the court at noon on January 21, 1998, after speaking with his attorney and finding out that he had been ordered deported. A reasonable person would have attempted to contact the court as soon as possible if he had made an in advertent mistake. Instead, this respondent waited over two months before filing a motion to reopen with the court.

Accordingly, the court finds that exceptional circumstances did not exist for the respondent's failure to appear. His motion will be denied.

ORDER

WHEREFORE IT IS ORDERED that the respondent's motion to reopen should be, and hereby is, **DENIED.**

/s/ MIMI S. YAM
MIMI S. YAM
Immigration Judge

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:
[SINGH, RANJIT]

Case No.: A [72-669-621]

Docket: [San Francisco]

RESPONDENT/~~APPLICANT~~
IN [Deportation] PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On [Jan. 21, 1998], at [11:00] AM/~~PM~~, pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's/~~applicant's~~ request for relief from deportation/~~exclusion~~. However,

- ☐ the respondent/applicant was not present.
- ☒ the respondent's/~~applicant's~~ representative was present; however, the respondent/~~applicant~~ was not present.
- ☐ neither the respondent/applicant nor the respondent's/applicant's representative was present.

Therefore, as no good cause was given in regard to the failure to appear at the hearing concerning the request for relief, I find that the respondent/~~applicant~~ has abandoned any and all claim(s) for relief from deportation/~~exclusion~~.

Wherefore, the issue of deportability/~~excludability~~ having been resolved, it is HEREBY ORDERED for the reasons set forth in the Immigration and Naturalization Service charging document

☐ that the applicant be excluded and deported from the United States.

☒ that the respondent be deported from the United States to [India].

[Signature illegible]
Immigration Judge

Date: [1-21-98]
[11:25 am]

[* See Section 242B of INA for Motion to Reopen]

Appeal: RESERVED/WAIVED (A/I/B)

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-71043
INS No. A72-669-621

RANJIT SINGH, PETITIONER

v.

IMMIGRATION NATURALIZATION AND SERVICES,
RESPONDENT

Northern District of California,
San Francisco

[Filed: Oct. 31, 2002]

ORDER

Before: SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges.

The panel has voted unanimously to deny respondent's petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has

requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION COURT
550 Kearny Street, Suite 800
San Francisco, CA 94108

RE: [RANJIT SINGH]
FILE: A# [72 669 621]
DATE: [10/16/97]

TO: [ATTY J. KAUFMAN] Personally served by:
[Initials illegible]

NOTICE OF HEARING IN DEPORTATION PROCEEDINGS

Please take notice that the above captioned case has been scheduled for a (Regular/~~Master/Custody~~) Hearing before a Immigration Judge on [January 21, 1998] at [11:00 am] at

550 Kearny Street, Suite 800
San Francisco, CA 94108

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is accredited to represent persons before an Immigration Judge. Your hearing date has not been scheduled earlier than 14 days from the date of service of the Order to Show Cause, in order to permit you the opportunity to obtain an attorney or representative. You can request an earlier hearing in

writing. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions:

1. You may be taken into custody by the Immigration and Naturalization Service and held for further action.

2. Your hearing may be held in your absence under Section 242(b) of the Immigration and Nationality Act. An order of deportation will be entered against you if the Immigration and Naturalization Service establishes by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are deportable.

IF YOUR ADDRESS IS NOT LISTED ON THE ORDER TO SHOW CAUSE, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT, SAN FRANSISCO, CA, WRITTEN NOTICE OF YOUR ADDRESS AND PHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. IF YOU CHANGE YOUR ADDRESS, YOU MUST PROVIDE TO THE IMMIGRATION COURT WRITTEN NOTICE WITHIN FIVE DAYS OF ANY CHANGE OF ADDRESS, ON FORM EOIR 33. WRITTEN NOTICE TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU, AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of pro bono attorneys and representatives has been provided to you by the Immigration and Naturalization Service.

I-485/~~I-191/FOIR-40~~/I-589 ~~DUE BY~~ [On file w/ the Court].

UPDATED/AMENDED I-589 DUE BY _____
Clock Waived? yes /~~no/N/A~~
0001N/MSY/822/AT

Alien number: [72 669 621]

LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

(×) 1. You have been scheduled for a deportation hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years after the date of entry of the final order of deportation.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 244(e)(1) of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years from the date of scheduled departure or the date of unlawful reentry, respectively.

( ) 4. A final order of deportation has been entered against you. If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years after the date that you are scheduled to appear.

** The term "Exceptional Circumstances" refers to exceptional circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM DEPORTATION FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;

2) Suspension of deportation or voluntary departure as provided for in section 244(e) of the Immigration and Nationality Act; and

3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English and in [PUNJABI]. Oral notice of the contents of this notice was given to the alien in his/her native language, or in a language that he/she understands.

Date: [10/16/97]

Immigration Judge: _____

or

Clerk of the Court [initials illegible]

cc: Asst. District Counsel
0002N/MSY/822/at

Supreme Court, U.S.
FILED
MAY 2 8 2003
OFFICE OF THE CLERK

(2)

No. 02-1123

In the
Supreme Court of the United States

Immigration and Naturalization Service,
Petitioner,

v.

Ranjit Singh,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James P. Schenkel
Counsel of Record
555 De Haro Street #320
San Francisco CA 94107
415-553-4000

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In the

Supreme Court of the United States

Immigration and Naturalization Service,
Petitioner,

v.

Ranjit Singh,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Under the Immigration and Naturalization Act of 1994, an alien may have his *in absentia* deportation order reopened if he can show that he missed his adjustment-of status hearing because of "exceptional circumstances." The question in this case is whether the United States Court of Appeals erred when it held that the Board of Immigration Appeals ("BIA") was required to consider the totality of the circumstances of the particular case in

determining whether such circumstances existed including the fact that the Immigration Judge ("IJ") would have had no choice but to grant the application if the alien had appeared. As will be shown, the court did not err. And even if it did, the case does not merit this court's attention because despite the Immigration and Naturalization Service's parade of horribles the decision is narrow and will apply to very few cases.

Statement

Respondent Ranjit Singh, a native and citizen of India, entered the United States without inspection in July 1990. Petitioner's Appendix, 1a, 10a. On May 23, 1993, he married Harpreet Kaur, a lawful permanent resident. A.R. 56. On December 7, 1993 before deportation proceedings began his visa petition was approved. Respondent's App., A1; A.R. 45. On October 7, 1994, the I.N.S. began deportation proceedings against Singh by filing an Order to Show Cause alleging that he was deportable because he entered without inspection. Petitioner's

App. 10a. Singh's wife became a naturalized U.S. citizen on April 21, 1997 (A.R. 44); shortly thereafter, on June 11, 1997, Singh filed an application for adjustment of status to lawful permanent resident, based on his approved visa application and his wife's citizenship. See Petitioner's App, 2a; A.R. 39 43. A hearing was scheduled on that application for October 16, 1997, at 1:00 p.m. A.R. 74, 85. That hearing was then rescheduled for January 21, 1998, at 11:00 a.m., and Singh was given written notice of the new date and time. Petitioner's App., 10a, 18a 23a.

When Singh failed to appear at the hearing, he was ordered deported *in absentia* under 8 U.S.C. § 1252b(c)(1) (1994), as he learned when he, his wife, and his newborn child appeared at his attorney's office at 12:00 p.m. to prepare for what he mistakenly thought was a 1:00 p.m. hearing. See Petitioner's App. 1a. Two months later, Singh filed a motion to re-open the deportation proceedings. Petitioner's App. 10a. This was well within the 180-day time limit on motions to re-open permitted under

the INA. See 8 U.S.C. § 1252b(c)(3)(A) (1994).

The IJ denied Singh's motion on April 21, 1998, finding that he had not demonstrated the "exceptional circumstances" required for a motion to reopen an *in absentia* deportation order. Petitioner's App. 9a-13a; see 8 U.S.C. § 1252b(f)(2) (1994). The BIA affirmed in a cursory, per curiam opinion. Petitioner's App. 6a 8a. The court of appeals reversed the BIA's decision, holding that it had abused its discretion by not considering *all* of the relevant circumstances surrounding Singh's failure to appear, including the certainty that he had no reason to absent himself because his application for adjustment of status would have been granted. *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002); Petitioner's App., 1a-5a.

Reasons for denying the Petition for Certiorari

1. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme

Court, Rule 10. Here, the INS argues at most that the court of appeals misapplied the properly stated statutes and rules of law governing motions to reopen *in absentia* deportation orders. Thus, the court expressly recognized that it had to review the BIA's decision for an abuse of discretion. Petitioner's App. 2a; *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc). The court also correctly recognized that it had to reverse the BIA's denial of a motion to reopen if it was "arbitrary, irrational, or *contrary to law*." Petitioner's App., 2a (emphasis added); *Ahwazi v. INS*, 751 F.2d 1120, 1122 (9th Cir. 1985). Whether the BIA correctly interpreted the INA i.e., whether the denial is contrary to law is a purely legal question, which the court reviews de novo. *Socop-Gonzalez*, at 1187; *Lopez v. INS*, 184 F.3d 1097, 1099 (9th Cir. 1999). Finally, the court accurately cited the correct statutory standards governing such motions to reopen: 8 U.S.C. § 1252b (c)(3)(A) (1994) and 8 U.S.C. § 1252b(f)(2) ("'Exceptional circumstances' is defined by statute as

'exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.'") Petitioner's App. 2a.

The court then applied these correctly stated principles of law to determine that "exceptional circumstances" exist where the alien inadvertently misses a hearing at which the alien's application for adjustment of status *must be granted* because the alien is "the beneficiary of an approved visa petition." See Petitioner's App. 3a (emphasis added).

The INS contends that the court mistakenly concluded that it had conceded at oral argument that Singh would not have been ordered deported at the hearing. Petitioner's App. 10, fn. 2. Whether the INS made such a concession is irrelevant because it is clear that, under BIA precedent, the IJ would have had no choice but to grant Singh's petition. See *Socop-Gonzalez*, 272 F.3d at 1197 ("had Socop filed a motion to reopen to seek readjustment of status, the BIA could only have granted his motion if he also

submitted an approved visa petition"), citing *In re Arthur*, 20 I & N Dec. 475 (1992). Because the court presumed that Singh's application would have been granted based on his approved visa petition, its decision is limited to that situation.

The court also correctly pointed out that, in evaluating whether exceptional circumstances exist, it must look to all "the particularized facts presented in each case." Petitioner's App. 4a; *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000). It then applied that correct principle of law by considering the facts here, including that the alien simply had no reason to skip the hearing that would have been the triumphant conclusion of his efforts to obtain the legal right to remain in this country with his wife and child. Petitioner's App. 4a.

Finally, the court agreed with the Seventh Circuit that the INS should not deny reopening of an *in absentia* deportation order "where the denial leads to the unconscionable result of *deporting an individual eligible for relief from deportation.*" Petitioner's App. 5a, citing *Chowdhury v. Ashcroft*,

241 F.3d 848, 853 (7th Cir. 2001) (emphasis added). In applying the rule stated in *Chowdhury*, the court here noted that Chowdhury was also the recipient of an approved visa application, and that he could not be deported without either breaking up his family or requiring U.S. citizens to move to India. See Petitioner's App. 5a. Those are the same circumstances as are found here. It is thus no wonder that the court of appeal reasoned that *Chowdhury* mandated the result here.

Because the court of appeal applied the "properly stated rule[s] of law," this Court should not grant the INS's petition for writ of certiorari. See Rules of the Supreme Court, Rule 10.

2. The INS also attempts to bring this case within this Court's requirements for granting certiorari by arguing in essence that the court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rules of the Supreme Court, Rule 10(a); see Petition for Certiorari, 15-16. But that attempt must fail because the asserted

conflict does not exist. The INS attempts to manufacture it by citing only two published cases from other circuits, along with unpublished court of appeals decisions from three other circuits: three from the Fourth Circuit, and one each from the First and Sixth Circuits. Putting aside the unpublished cases, the two published cases are not in conflict. In *Ursachi v. INS*, 296 F.2d 592 (7th Cir. 2002), the question was whether the alien had met his evidentiary burden of establishing his serious illness; the court held that he had not. But unlike the case here and in *Chowdhury*, 241 F.3d 848, 853, the alien had not received an approved visa petition. Nothing in the record suggested that he would have received an adjustment of status. Likewise, in *de Morales v. INS*, 116 F.3d 145, 148-149 (5th Cir. 1997), the aliens had no asylum or other claims for relief pending when their car broke down, causing them to miss the hearing. Thus, these cases have no bearing on how the BIA should decide when, as here, the alien has an approved visa petition.

Because the court of appeals' decision is not

"in conflict with the decision of another United States court of appeals on the same important matter," this Court should not grant the INS's petition. See Rules of the Supreme Court, Rule 10(a).

3. Finally, the INS asks this court to recoil in horror at the burden this decision will supposedly place on the INS in being forced to hold thousands of hearings on petitions to reopen *in absentia* deportation orders. Petition for Writ of Certiorari, 16-18. But the INS misconstrues the scope of the court's decision here. In no way can it be read to mandate "detailed consideration of the merits of the underlying deportation case and the alien's application(s) for relief from deportation" in all cases of motions to reopen. Petition for Certiorari, 17. Rather, the court's language must be read in light of the unusual facts of Singh's case: (1) his immediate-relative visa petition had been approved; and (2) he was married to a United States citizen. Respondent's App., 1A, Petitioner's App. 2a-3a. As the court carefully noted, under those circumstances,

Singh would not have been deported at the hearing. See *Socop Gonzalez*, 272 F.3d at 1197, citing *In re Arthur*, 20 I & N Dec. 475 (1992). Thus, the decision is limited to circumstances where, on the face of the record, the BIA would have no choice but to grant a petition for adjustment of status. There is thus no need for the INS to hold a mini-hearing to decide whether it would have granted an application in its discretion.

Conclusion

The Ninth Circuit Court of Appeals' decision correctly stated the legal principles it applied in this case, and correctly applied them under the narrow circumstances here. Its decision is not in conflict with that of any other United States court of appeals on this issue; and it will not lead to a rash of aliens attempting to circumvent *in absentia* deportation orders. This decision's sole effect is to allow an immigrant with an approved visa petition to remain in this country with his U.S. citizen wife and child.

This Court should therefore deny the INS's

petition for a writ of certiorari.

Respectfully submitted,

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San Francisco CA 94107
415-553-4000

May 2003

APPENDIX

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1. U.S. Department of Justice, Immigration and Naturalization Service, Approval Notice, dated December 7, 1993 ..... A1

U.S. Department of Justice

Immigration and Naturalization Service

Notice of Action

Applicant/Petitioner A #

A 41 808 618

Application/Petition I130

IMMIGRANT PETITION FOR RELATIVE, FIANCE(E), OR ORPHAN

Receipt #		Appliant/Petitioner
WAC-94-02152875		KAUR, HARPREET
Notice Date	Page	Beneficiary A93 172 050
December 7, 1993	1 of 1	SINGH, RANJIT

HARPREET KAUR
1507 E MUNCIE AVE
FRESNO CA 93720

Approval Notice
Class: C21
Priority Date: October 28, 1993
Notice also sent to: None

The above petition has been approved.

We have sent it to the Department of State Immigrant Visa Processing Center (TIVPC), Suite 700, 1401 Wilson Blvd, Arlington, VA 22209

This completes all INS action on this petition. The Department of State Immigrant Visa Processing Center will communicate shortly with the person the petition is for concerning further immigrant visa processing steps.

Please read the back of this form carefully for more information.

You will be notified separately about any other applications or petitions you filed. Save this notice. Please enclose a copy of it if you write to us about this case, or if you file another application based on this decision. Our address is:

IMMIGRATION AND NATURALIZATION
SERVICE
WESTERN SERVICE CENTER
P.O. BOX 30111
LAGUNA NIGUEL CA 92607-0111
Tel: (714) 643-4880

Supreme Court, U.S.
FILED
JUN 3 ˜ 2003
OFFICE OF THE CLERK

No. 02-1123

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL, PETITIONER

v.

RANJIT SINGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
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Department of Justice
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Under the statutory provisions that govern this case, which are materially the same as current law, see Pet. 5-6 n.1, respondent's *in absentia* deportation order is not subject to reopening unless respondent shows that his failure to appear at his deportation hearing "was because of exceptional circumstances" (8 U.S.C. 1252b(c)(3)(A) (1994)) "beyond [his] control" (8 U.S.C. 1252b(f)(2) (1994)). Moreover, when the court of appeals reviewed the administrative determination that such "exceptional circumstances" do not exist in respondent's case, it was limited to considering "the reasons for the alien's not attending the proceeding." 8 U.S.C. 1252b(c)(4) (1994).

The petition demonstrates (Pet. 11-15) that the court of appeals overturned respondent's deportation order on grounds—involving its perception of family hardship and the likelihood that respondent would have obtained discretionary relief from deportation if he had appeared

at his deportation hearing—that are not related to "the reasons for the alien's not attending the proceeding," 8 U.S.C. 1252b(c)(4) (1994). Those grounds therefore were beyond the authority of the court of appeals to consider when reviewing a decision of the Board of Immigration Appeals (BIA) declining to reopen a deportation order entered *in absentia.* Moreover, the reason that respondent concedes led to his failure to appear—mere "inaderten[ce]" (Br. in Opp. 6), after receiving written notice of the date and time of the hearing—clearly does not constitute a reason "beyond the control of the alien," much less circumstances as "compelling" as "serious illness of the alien or death of an immediate relative of the alien," which are what 8 U.S.C. 1252b(f)(2) requires. Respondent makes no effort to defend the court of appeals' decision under the explicit statutory text.

The Ninth Circuit's published decision will impose substantial burdens by complicating reopening proceedings. Immigration judges within the Ninth Circuit entered nearly 8000 *in absentia* orders in Fiscal Year 2002. Pet. 16. Also within the Ninth Circuit's boundaries, aliens who failed to appear and had a final order entered against them in Fiscal Year 2002 already had filed more than 1200 motions to reopen as of January 2003. Pet. 18. The precedential decision in this case will require immigration officials and administrative adjudicators to consider, in a large number of reopening proceedings, the merits of aliens' arguments for relief in earlier deportation proceedings, thus nullifying the limitations that Congress placed on reopening cases that aliens defaulted by failing to appear, and creating a substantial new administrative burden. Pet. 16-18.

Because the court of appeals' decision is plainly incorrect, and its harm is great, summary reversal is warranted.[1]

1. Respondent argues that review by this Court is not warranted because the court of appeals cited the correct provisions of the immigration laws, and "at most * * * misapplied the properly stated statutes and rules of law." Br. in Opp. 5. Thus, respondent contends that the court of appeals correctly stated that it could review the BIA's decision only for abuse of discretion (see *ibid.*, citing Pet. App. 2a), but then asserts, inconsistently, that the question of the proper interpretation of "exceptional circumstances" is "a purely legal" one that a court reviews de novo (*ibid.*). Contrary to the latter assertion, this Court has made clear that the Attorney General's interpretation of the immigration laws is entitled to broad deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144-145 (1981) (per curiam) (deferring to Attorney General's interpretation of "extreme hardship" required for suspension of deportation).

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[1] The Immigration and Naturalization Service (INS) was the respondent in the court of appeals and the original petitioner in this Court. See 8 U.S.C. 1105a(a)(3) (1994). On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its functions were transferred to the newly formed Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 116 Stat. 2192, 2195 (6 U.S.C. 251, 271). Respondent challenges a decision of the Board of Immigration Appeals within the Justice Department's Executive Office for Immigration Review. Therefore, the Attorney General has been substituted for the former INS as the petitioner in this case. Cf. 8 U.S.C. 1252(b)(3)(A) (designating Attorney General as proper respondent in petition for review proceedings that arise under post-1996 immigration law).

The BIA's interpretation is that Section 1252b means what it says, and the "exceptional circumstances" that will support a motion to reopen an *in absentia* order are limited to "exceptional circumstances * * * beyond the control of the alien" that caused the failure to appear and that are no "less compelling" than the alien's serious illness or an immediate relative's death. 8 U.S.C. 1252b(c)(3)(A), (f)(2) (1994); see Pet. App. 7a-8a. The court of appeals' view, by contrast, is that a motion to reopen an *in absentia* deportation order must be granted "where the denial leads to the unconscionable result of deporting an individual [who would have been] eligible for relief from deportation" if he had appeared at his deportation hearing. Pet. App. 5a. Determining which interpretation of Section 1252b is correct involves a question of statutory construction that has substantial prospective importance, and that merits this Court's review.

2. Respondent also suggests (Br. in Opp. 6-7, 10-11) that the court of appeals' decision is binding circuit precedent only when it is clear that the alien actually would have avoided deportation if he had appeared for his deportation proceeding. The published opinion is not so limited. Rather, the opinion states that although respondent concededly was deportable, he was "eligible" *to be considered* for discretionary relief from deportation. Pet. App. 2a.[2] It therefore is not surpris-

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[2] Respondent contends that the BIA "would have had no choice but to grant" his petition for adjustment of status, Br. in Opp. 6-7 (citing *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1197 (9th Cir. 2001) (en banc)), and that the court of appeals' decision in this case therefore should be read as limited to situations in which the alien would not have been ordered deported if he had appeared at his hearing. Respondent errs in relying on *Socop-Gonzalez* to narrow the court of appeals' decision, which did not even cite *Socop-Gonzalez*. The relevant passage in *Socop-Gonzalez* simply notes that an approved

ing that in several recent unpublished decisions, the Ninth Circuit has suggested a broad understanding of this case. See *Jale* v. *Ashcroft*, 52 Fed. Appx. 972 (9th Cir. 2003) (focusing on "unconscionable result" language of instant decision); *Olivera-Gutierrez* v. *Ashcroft*, 42 Fed. Appx. 993, 993-994 (9th Cir. 2002) (suggesting that exceptional circumstances exist when the alien has a "reasonable" misunderstanding about the time of his deportation hearing and a "valid claim for relief from deportation"); see also *Chen* v. *INS*, 58 Fed. Appx. 327, 328 (9th Cir. 2003) (remanding in light of instant decision); *Markossian* v. *INS*, 57 Fed. Appx. 762 (9th Cir. 2003) (same); *Demian* v. *INS*, 48 Fed. Appx. 708, 709 (9th Cir. 2002) (same).

Furthermore, even if the instant decision is controlling only when it is thought to be clear that the alien "would not have been deported" (Pet. App. 2a), the decision will have very broad consequences. Under that reading, the facts of each case will have to be reviewed in the reopening proceeding to determine the strength of the alien's application for relief in the earlier deportation proceeding.[3] That judicial mandate will convert thousands of proceedings involving the

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visa petition is a necessary condition for granting adjustment of status. See 272 F.3d at 1197. Even when that condition of eligibility is satisfied, it remains a matter of discretion for the immigration judge or the BIA whether to grant an application for adjustment of status.

[3] See, *e.g.*, *Garewal* v. *Ashcroft*, No. 02-70798, 2003 WL 21206151, at *1 (9th Cir. May 20, 2003) (unpublished decision) (suggesting that reopening is required under instant decision when alien made a "strong showing of entitlement to relief" in the underlying proceeding); *Lopez-Palomino* v. *Ashcroft*, 61 Fed. Appx. 507, 508 (9th Cir. 2003) (reopening not required under instant decision if discretionary relief was possible, rather than certain, in the underlying proceeding).

reopening of *in absentia* orders—which now are very limited in scope due to statutory restrictions that focus the inquiry on whether the aliens' reasons for failing to appear were truly compelling and beyond their control—into quasi-merits proceedings that address the same questions that would have been resolved if the aliens had not defaulted on their applications for relief in the first place. See Pet. 17-18.

3. Respondent contends that there is no substantial conflict among the courts of appeals about the correct application of the "exceptional circumstances" limitation. He suggests (Br. in Opp. 9) that no direct conflict exists because the published decisions discussed in the petition (Pet. 15-16) do not involve aliens with approved visa petitions. As explained above, however, the Ninth Circuit's decision in this case is not limited to the precise facts in this record, and the decision has not been so understood by other Ninth Circuit panels. The circuit conflict described in the petition—involving whether the statutory "exceptional circumstances" limitation permits consideration of circumstances beyond the alien's reasons for failing to appear, which no other court of appeals has allowed, see Pet. 15-16—warrants resolution by this Court.[4]

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[4] Respondent's assertion (Br. in Opp. 8) that the Ninth Circuit's decision in this case is support by *Chowdhury* v. *Ashcroft*, 241 F.3d 848 (7th Cir. 2001), is incorrect. As the petition explains (see Pet. 16 n.3), *Chowdhury* did not address the reopening of *in absentia* orders.

* * * * *

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the court of appeals.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2003